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Nos. 4-9

IN THE

Supreme Court of the United States

October Term, 1949

UNITED STATES OF AMERICA, *Petitioner*

v.

GERLACH LIVE STOCK COMPANY, *a Corporation*

UNITED STATES OF AMERICA, *Petitioner*

v.

J. SHELDON POTTER

UNITED STATES OF AMERICA, *Petitioner*

v.

MARTIN ERRECA

UNITED STATES OF AMERICA, *Petitioner*

v.

JAMES J. STEVINSON, *a Corporation*

UNITED STATES OF AMERICA, *Petitioner*

v.

ARCHIBALD J. STEVINSON

UNITED STATES OF AMERICA, *Petitioner*

v.

3-H SECURITIES COMPANY

On Writs of Certiorari to the Court of Claims

SUPPLEMENTAL BRIEF FOR GILL, ET AL., AMICI CURIAE

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SUPPLEMENTAL BRIEF FOR GILL, ET AL., AMICI CURIAE

This brief is designed to bring up to date the administrative and statutory material bearing on the issues before this Court and to supply brief answer to a number of the contentions made by the Government in its two briefs

in reply to the briefs filed on original argument. We shall, for the possible convenience of the Court, follow the headings and numeration used in our main brief.

II

CONGRESS HAS DETERMINED THAT IRRIGATION RIGHTS, VALID UNDER STATE LAW, MUST BE PAID FOR WHEN TAKEN BY A RECLAMATION PROJECT.

A. The Reclamation Laws Generally

2. *Water Rights Taken By a Reclamation Project Must Be Paid For.* The Government's Supplemental Brief (pp. 26-27, 32-36, 38-40) introduces a fair degree of confusion by assimilating the issue here — the compensability of vested irrigation rights based on navigable waters — to the different issue of the power to obstruct navigable waters.

The Act of March 3, 1899 (30 Stat. 1151, 33 USC Sec. 403)[1] forbids "the creation of any obstruction to the navigable capacity of any of the waters of the United States." Any structure which in fact obstructs or impedes navigation is thereby forbidden. So, too, is any diversion of navigable waters which as a matter of fact — not theory — "substantially interferes with the navigable capacity within the limits where navigation is a recognized fact." *United States v. Rio Grande & L. Co.*, 174 U. S. 690, 709;[2] see *Sanitary District of Chicago v. United States*, 266 U. S. 405. A structure or a diversion which does not in fact offer substantial interference to actual navigation is not unlawful, and need not be authorized by Congress or by

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[1] Identical in the respects significant here with the Act of Sept. 19, 1890 (28 Stat. 454) considered in *United States v. Rio Grande Irrigation & L. Co.*, 174 U. S. 690.

[2] The contemplated dam across the Rio Grande, as the case came to this Court, would have virtually dried up the Rio Grande for 300 miles down stream, would have given a private corporation control of the entire flow of the river, and would have obstructed actual navigation all the way to the mouth of the river. 174 U. S. at 691-692.

the Secretary of War. This is evident from the words of the statute and has been stated as the policy of the Corps of Engineers. See *Converse v. Portsmouth Cotton Oil Refining Corp.*, 281 Fed. 981, 986 (C. C. A. 4), cert. den. 260 U. S. 724.

The navigability of the San Joaquin above Stockton has been of no practical importance since 1871 (*infra*, pp. 19-20). However, the theoretical navigable capacity of the River has without question been diminished by an accumulation of water diversions each of which is insignificant in itself. There is no occasion in these cases to develop the validation of these diversions[3] for these cases deal with riparian not appropriative rights, with overflow not diverted waters, and the Government does not suggest that the Congress has made it unlawful to receive water placed on the land by the river itself. There will, in fact, probably never be an occasion for this or any other Court to consider the compensability of rights to divert the San Joaquin's ordinary flow. The policy of the Bureau of Reclamation is to replace all irrigation rights based upon ordinary or low-water flow of the San Joaquin and to purchase only the grassland rights which are based upon the flood waters. The Government cannot — at least without unravelling much of its constitutional argument — contend that the diversion of flood waters "substantially interferes with the navigable capacity within the limits where navigation is a recognized fact."

The issue here, to repeat, is the compensability of riparian irrigation rights taken by the Government in order to sell the water to other persons on other lands. As the

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[3] The Government attempts (Sup. Br. 38-40) to show the contrary by a proposal from the district engineer, in 1917, that Congress allow free diversion of the San Joaquin waters for another 28 years and then reexamine the situation. But, as the Government points out, even this modest proposal was rejected by the Board of Engineers, because it felt no objection should be taken to the irrigation diversions. See *infra*, p. 19.

water right is vested under state law, Section 8 of the Reclamation Act of 1902 (38 Stat. 388, 43 U. S. C. Sec. 383) requires compensation for its taking. Since the Government no longer suggests that state law cannot, even as among private persons, apply to navigable waters (Sup. Br. 54), Section 8 is wholly applicable.

The Government seeks to escape the force of Section 8 by erecting an unusual identity between appropriative rights and beneficial use (Sup. Br. 36-38). Section 8, of course, prescribes beneficial use as the basis and the measure of water rights in reclamation projects. Appropriations, of course, are in California as in other states valid only if put to a beneficial use. But these premises afford no foundation for the Government's sidewise jump to the extraordinary conclusion that riparian rights cannot be put to a beneficial use. In California as elsewhere, after as well as before the 1928 amendment, riparian rights put to a beneficial use are protected: the law "not only protects the actual reasonable beneficial uses of the riparian but also the prospective reasonable beneficial uses of the riparian." *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 525, 45 P. 2d 972; *Meridian, Ltd. v. San Francisco*, 13 Cal. 2d 424, 445, 90 P. 2d 537.

Finally, it should be noted that in none of its three briefs does the Government cite a single case in direct support of its construction of Section 8, and in none does it deal with or even mention the decision of this Court in *Mason Co. v. Tax Commission*, 302 U. S. 186, 199-203, where Chief Justice Hughes went to much pains to explain just what the Secretary of Interior had to do and had done to gain control under state law of the navigable waters of the Columbia River. See, also, *First Iowa Coop. v. Power Com'n*, 328 U. S. 152, 158, 175-176 (*infra*, note 11).

4. *The Administrative Practice.* It is perhaps well to note the posture of the controversy as to the practice of the Bureau of Reclamation in applying Section 8 of the

Reclamation Act. The Government in its main brief relied upon a 1905 decision of the Secretary of the Interior which did not consider or mention Section 8 (pp. 69-70). We attempted to show that this decision was irrelevant to the issues here, quoted a categorical statement of the Bureau of Reclamation in 1945, and showed the Bureau's recognition in its basin planning of the irrigator's right to replacement water. In its reply brief (p. 6), the Government disputed our conclusion only because counsel for the State of Arizona, in litigation against the Government, argued to this Court in *Arizona v. California*, 283 U. S. 423, 439, that the Boulder Canyon Project would not protect the State's control of the waters of the Colorado. The Government overlooked the decision of this Court in that very case, where it pointed out that Section 18 of the Boulder Canyon Project Act (45 Stat. 1057, 43 U. S. C. Sec. 617), which is broadly similar to Section 8 of the Reclamation Act, protected the state's rights to those navigable waters and therefore make baseless the claim of anticipated injury. In its supplemental brief (p. 42-44), the Government again ignores the categorical statements of the Department of the Interior and the Commissioner of Reclamation (*infra*, pp. 11, 23-24) and seeks to establish an administrative practice only by taking inaccurate[4] issue with our administrative citations (main brief, p. 26) from collateral fields. We submit that it has

[4] The only citation of real significance to either side was *Theodore A. Iasigi*, 39 L. D. 285, which held that Colorado River diversions in actual use were valid for a desert land entry. The decision held just that. The Government seems to have been misled by the fact that patent to another tract of Iasigi's was rejected in the same opinion because Iasigi had insufficient water. Our use of *Underground Water Claims*, Utah, 55 L. D. 378, has no relevance now that the Government has receded (Sup. Br. 54) from its earlier (Br. 68, 47) suggestion that state water laws are wholly inapplicable to navigable waters. For the rest, the Government seeks to convict us of error by noting that the decisions on their facts did not or might not have involved navigable waters, which we have never disputed.

not managed to raise a substantial doubt as to the administrative practice under the reclamation laws generally.

B. The Central Valley Project.

1. *The Authorizations.* We developed in our main brief (p. 28) that the administrative authorization under the reclamation laws specifically called for "the purchase of water now used for the irrigation of pasture lands" and the legislative reauthorization authorized the acquisition of water rights by eminent domain or otherwise. The Government makes a determined effort to escape the force of those provisions.

(a) The Government seeks to minimize the administrative authorization by the unwarranted assertion (Sup. Br. 16, 36) that the Secretary and the President cannot proceed with an administrative authorization under the reclamation laws when navigable waters are involved. It is true that in 1905 the Secretary asked Congressional authority to dam the upper Yellowstone River, but it was asked and granted only "in order that there may be no question as to the authority of the Secretary" (Govt. Sup. Br. 35). But since 1905 much navigable water has flowed over reclamation dams. Congress since 1905 has three times clarified and strengthened the procedure for administrative authorization of reclamation projects, and in no case was there any exception of navigable waters. Sec. 4, Act of June 25, 1910, 36 Stat. 835, 43 U. S. C. Sec. 413; Sec. 4(B), Act of December 5, 1924, 43 Stat. 702, 43 U. S. C. Sec. 412; Sec. 9(a), Act of August 4, 1939, 53 Stat. 1187, 43 U. S. C. Sec. 485. The latest act, indeed, makes it indisputably clear that the administrative authorization reaches to navigable waters, for in Section 9(b) it provides authority and procedure for allocating part of the cost to navigation benefits. Even before its enactment, this court in *United States v. Arizona*, 295 U. S. 174, 187-188, had left it, we would have thought, wholly clear that the

1910 Act itself was sufficient basis for an administrative authorization of projects involving navigable waters.

(b) The Government (Sup. Br. 17-18) urges that the authorization to condemn water rights in the legislative reauthorizations in 1937 and 1940 carries no implication that Congress considered them compensable. Concededly, the Congress has on a number of unrelated occasions authorized special suit or condemnation without admitting liability by the jurisdictional enactment. But when the Congress reauthorizes an administrative plan calling for the purchase of water rights, authorizes their purchase or condemnation, and over a 14 year period appropriates more than $5,000,000 for their purchase, it is a fair inference that the Congress intended the rights to be purchased.

(c) The Government does not and cannot deny that these authorizations relate to the waters of the San Joaquin. It seeks, however, to imply the contrary by the statement that water rights on many non-navigable streams will

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[8] We have not, in view of the clarity of the 1939 statute, undertaken any comprehensive survey. It appears, however, that the Secretary has proceeded without Congressional authorization in the following projects involving navigable waters of the United States: Truckee-Carson (Lake Tahoe); Central Valley ("reauthorized" after 2 years by Congress to transfer Army Engineer funds; see our main brief, p. 17); Yuma (Colorado River, see *United States v. Arizona*, 295 U. S. 174, 184-186); Davis Dam (Colorado River); Marshall Ford (Colorado River, Texas). Other projects involving navigable waters have been specially authorized by Congress for a variety of special reasons which would be profitless to pursue here. See, for a general statement of the executive policy to forego the administrative authority and obtain Congressional authorization in the case of large and important projects, Commissioner Straus before the House Appropriations Committee for F. Y. 1950, 81st Cong., 1st Sess., Pt. 2, pp. 182-185.

The Government's confusion between a legislative authorization and an appropriation (Sup. Br. 16) seems to need no argument in reply.

be directly affected by the project (Sup. Br. 18-19). The statement is quite erroneous.[6]

(d) Finally, the Government says that since Congress could not have intended to authorize purchase of *some* rights of ways,—those reserved under the Act of 1890—it could not have intended in the same phrase to authorize purchase of *any* water rights (Sup. Br. 19-20); the fallacy is patent.

2. *The Practice.* Since the first argument of this case the Congress has again dealt with the annual appropriation for the Central Valley Project.

F. Y. 1950. The Bureau advised the Congress that a project total of $6,150,000 would be required for the purchase of water rights and requested $175,000 for 1950. It noted that a total of $5,377,498 would have been spent for the purchase of water rights by June 30, 1949. Hearings, Pt. 2, p. 281. The appropriation bill (H. R. 3638, 81st Cong.) carried $53,550,000 for the project generally as passed by the House and $60,789,890 as passed by the Senate.

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[6] We suppose that a project of this magnitude must necessarily produce unexpected or collateral consequences outside the beds of the two rivers directly involved. One example is cited by the Government: a claim by Redding that Shasta Reservoir unduly cooled the municipal swimming pool. However this may be, we think it entirely plain that the authorizations contemplated only the purchase of the San Joaquin water. *Pitt River Power Co. v. United States*, 98 C. Cls. 253, cert. den. 319 U. S. 747, is the only citation in support of the contrary assertion by the Government. The Pitt River is a tributary of the Sacramento and its uplands were partially flooded by Shasta Reservoir. The power company brought premature suit for flooding of its *lands*, with one unexplained paragraph mentioning undescribed riparian rights to those lands. The Fresno Slough carries the water of the Kings River to the San Joaquin at Mendota; Miller & Lux by the 1939 contracts was to be given exchange water for its Fresno Slough rights; and no issue of purchase of non-navigable or navigable waters was involved except as the Government concedes our point (main brief 29) that the entire $100,000,000 diversion of the Sacramento, to replace San Joaquin water, is in satisfaction of San Joaquin rights.

1936-1950. The Government attempts to avoid this 14 year history of disclosure and ratification by appropriation along five paths:

(a) It implies that the Congress did not have "full knowledge" (Reply Br. 10-11, Sup. Br. 29, 46). We should ourselves hesitate to suggest that the Congress would appropriate more than $5,000,000 over a 14 year period without knowing what it was doing. With this new contention of the Government in mind, the Appendix to this brief supplements our original presentation—confined largely to the official budget presentation and Congressional action—by excerpts from testimony offered, in half a dozen years, before the House Appropriations Committee, by the Commissioner of Reclamation, by the Regional Director of Reclamation, and by (or in their behalf and presence) twenty members of Congress. We do not believe the Government is entitled to deny that Congress was fully advised that the Bureau was as a matter of course buying water rights to the San Joaquin grass lands.

(b) The Government next suggests that the Department of the Interior wished the funds, and Congress appropriated them, in order that they might be used to avoid injunction suits "by 'large' and 'influential' interests", and payment made "where to do so would advance other interests of the Government." (Reply Br. 10, Sup. Br. 44). It is not necessary to assay the morality of any such policy, for the Commissioner of Reclamation in the passage cited by the Government testified to just the opposite policy: He recognized that the Bureau *must* buy *all* San Joaquin water rights. He explained that the Bureau was buying them *before* their taking, rather than after, because they feared that large and influential interests might otherwise by litigation tie up construction indefinitely. This is far different from a statement that only those interests would be paid, or even that the pay-

ment was to be made only out of fear of litigation. The full text of the relevant parts of the colloquy are quoted in the Appendix (*infra*, pp. 23-24).

(c) The Government then fastens upon the accidents of appropriation structure, and asks that weight be put on the fact that Congress did not often use statutory language so detailed as to specify "water rights." (Sup. Br. 20). The shifting trends between detailed and general appropriation are well illustrated by these statutes,[7] but it is perfectly plain that the Congress considers that it has acted on, and thereby limited executive discretion to, the detailed justification which lies back of the general appropriation. See, as to the Central Valley Project itself, the catechism included in the hearings for F. Y. 1950 before the House Committee on Appropriations, Pt. 2, pp. 286-287.

(d) A further attempt to escape this 14-year history is to assert that even though Congress has known of and has appropriated for these purchases, respondents are not aided because Congress can direct payment to some but not to all (Sup. Br. 44-46). *United States v. McDougall's Adm'r*, 121 U. S. 89, which receives heavy reliance by the Government, itself points the fallacy in the Government's argument. We do not urge that because Congress and the executive have paid Miller & Lux and the Chowchilla Farms, several millions of dollars, they must also, for that reason alone, pay these claimants. Congress can honor *particular* claims—a phrase three times repeated in the first paragraph of the *McDougall* opinion quoted by the Government—without creating a general lia-

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[7] See our main brief, pp. 29-32. For F. Y. S. 1937-1940, and again in F. Y. 1950, there was one general appropriation for the "Central Valley Project". Considerable detail was used for F. Y. 1944, and a middle ground, dividing off irrigation facilities generally, for F. Y.'s 1947-1949. See, generally, Commission on Organization of the Executive Branch of the Government, Report on Budgeting and Accounting, 12-13; Task Force Report, Appendix F, 48, 77-78.

bility. But, as the *McDougall* case itself makes clear, if the Commissioner in that case had been granted general authority to purchase beef for Indians, and if he had for 14 years asked and after annual justification been granted appropriations to pay for beef for California Indians, this history would be conclusive that the Congress intended to recognize a general liability to all who sold beef for that purpose.

(e). The final effort by the Government to explain away this administrative and legislative history is to insist that none can be paid beyond the limit of the available appropriation (Sup. Br. 21-22). Of course we do not urge that Congress has appropriated specifically for these respondents, and that they may be paid forthwith; we urge instead that it has consistently recognized the Government's liability to all those so situated. The appropriation of specific funds will come when the Court of Claims judgments are presented to the Congress.

We quoted in our main brief (p. 33) the following categorical statement in the Comprehensive Plan for the Central Valley Basin, distributed by the Department of the Interior in 1945:[8]

> "In conducting irrigation investigations and constructing and operating projects throughout the West, the Bureau of Reclamation fully recognizes and respects existing water rights established under State law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure.

[8] We might have added the following from that report (Comprehensive Plan for Water Resources Development, Central Valley Basin, California, U. S. Department of Interior, Bureau of Reclamation: Planning Report No. 2-4.0-3, Nov. 1945, pp. 20-21):

"This basin report on the Central Valley is predicated on such a policy [that above quoted]. * * *

In addition to respecting all existing water rights, the Bureau in this report has complied with California's "county of origin" legislation * * *."

The Government, though this is obviously the most relevant published statement of administrative practice, has ignored it in all its briefs. That statement has neither been withdrawn nor revised in consequence of the position taken by the Department of Justice in these cases. To the contrary, the following developments have occurred or been made public during the past summer. On December 1, 1947 (one month before these cases were argued in the Court of Claims) the Regional Director submitted a revised report and plan in consequence of comments from California and several Federal agencies. The exact language quoted above was repeated, as the first paragraph of the section entitled "Water, Land and Power Policies," (par. 70) and an estimate of $1,100,000 was offered as the amount required to complete purchase of water rights *from the San Joaquin* (Table 3, p. 30). On July 29, 1948 (two months before the Government's petition was filed in these cases) the Secretary of the Interior approved the report and plan and transmitted it to the President with the statement that unless he had objection it would be tranmitted to the Congress in accordance with the provisions of the Reclamation Laws. On August 15, 1949 (about one month before the Government's brief on reargument was due) the President authorized submission of the plan to the Congress. On August 29 the Secretary submitted the Plan to the Speaker and the President of the Senate.[9]

We direct the Court's attention to the somewhat unusual fact that nowhere in its three briefs does the Government directly say what the administrative practice has been. Nowhere in its three briefs does it directly deny that the administrative practice in the Central Valley has been that stated by the Commissioner and Regional Direc-

[9] All reports mentioned have been released to the public by the Department of the Interior. The Secretary in his letter of August 29, 1949, requested that they be printed as a House or Senate document and this presumably will be done in the near future.

tor of Reclamation. This is a simple issue—what in fact has been the Department's practice—and deserves simpler treatment than it has received. Finally, we do not see—on the issue of administrative policy and practice—that the Department of Justice has standing to present to this Court contentions which are opposed to the statements submitted to the Congress by the Department of the Interior with the approval of the President.

C. The Statutory Promise Is Ground for Suit

The Government in its supplemental brief (pp. 8-15) presents an elaborate argument based upon the technical jurisdiction of the Court of Claims. In effect, it asks that this Court hold that the Congress has authorized the Government to buy or to condemn these riparian rights, if the officials buy from the wrong person (Nos. 4-6) or if they offer too little (Nos. 7-9), the owner is helpless and cannot sue.

Jurisdiction fails, the Government urges, because there has been no explicit *direction* to pay, but instead merely an authorization (Sup. Br. 8-10). This, says the Government (Sup. Br. 11-14) reflects the need that the Congress determine whether a moral or honorary claim should be paid by executive or judicial procedure, whether there should be a time limit on filing, whether there should be interest, and who shall be the beneficiaries. It cites a very large number of cases and statutes which have exemplified this Congressional caution. The discussion is beside the point.

In the first place we do not see that any of those procedural details would have been clarified if the Congress had added the two words "and directed" which the Government says are crucial.

In the second place, so far as these procedural incidents are concerned, there was no occasion whatever to spell them out. The purchase, condemnation or taking, with

liability over, of land or water rights is a daily occurrence. There would be neither need nor occasion for legislating a procedural system to acquire irrigation rights to navigable waters when it was already in operating existence with respect to land, rights of way, water rights and all other forms of property; it was necessary only for Congress to determine that the Government should not take irrigation rights—whether based upon navigable or non-navigable waters—without compensation. It is significant that of the many cases and statutes cited by the Government, where a liability beyond the constitution was created, only *United States v. Alexander*, 148 U. S. 186, dealt with condemnation of property (and that with damage rather than taking); the procedural system there established was necessary prior to the settling of the Court of Claims jurisdiction in *United States v. Lynah*, 188 U. S. 445.

The Government, although professing (Sup. Br. 9) to deal with "all of the cases cited in the brief for the claimants (pp. 34-35)", ignores the three which we believe to contradict its argument. *United States v. Lynah*, 188 U. S. 445, may be dubious constitutional authority as to when land is taken by flooding but the jurisdictional branch of that opinion had never been questioned. There the Court recited eight acts appropriating funds for the improvement of the Savannah River, one statute directing a survey as to the cause of, and the cost of protecting against, the damage to the river bank in question, and a general statute authorizing the condemnation of "land, right of way, or material". The Court continued (188 U. S. at 467):

> "Thus, beyond the effect of the admission in the answer, and beyond the presumption of knowledge which attends the action of all legislative bodies, it affirmatively appears, not only that Congress was making appropriations from year to year for the improvement of the river, but also that it had express

> notice of damage to the banks along this very plantation; that the works which were being done by the engineers had in view the narrowing of the width of the water way; that land would be damaged as the result of those works, and that it authorized the Secretary of War to take proceedings in eminent domain to acquire the land, right of way, and material which might be necessary for maintaining, operating, or prosecuting works of river improvement, or, if the price could be agreed upon, to purchase the same.
>
> This brings the case directly within the scope of the decision in *United States v. Great Falls Mfg. Co.* 112 U. S. 645."

In *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, the Court found a contract implied in fact to pay for land and water rights taken by a dam across the Maryland channel of the Great Falls of the Potomac; it placed substantial reliance on the appropriation, made after disclosure of the company's claim, to pay all existing liabilities.[10] Judge Cardozo, in *Oswego & Syracuse R. R. Co. v. State*, 226 N. Y. 351, 124 N. E. 8 (cited with approval in *Ford & Son v. Little Falls Fibre Co.*, 280 U. S. 369, 377) sustained the jurisdiction of the New York Court of Claims over a suit to recover the costs of removing an existing bridge across the Barge canal and replacing it with a bridge which complied with the new requirements. The state by general law and by the terms of the permit could have required the removal of the old bridge without compensation. The legislative direction that "new bridges shall be built over the canals to take the place of existing bridges wherever required" was sufficient to give the Court of Claims jurisdiction under a statute conferring it with respect to suits based upon an "appropriation by the state

[10] The decision was in 1884. No attention was directed in the opinion to the compensability of water rights in the navigable stream. But in 1884 the jurisdiction of the Court of Claims over a taking of land was at least as doubtful as the Government would have its jurisdiction in these cases.

of any lands, structures, waters * * *". So here, the much more specific undertaking to pay for riparian rights on the San Joaquin permits suit upon a statutory promise clearly made.

Again, the Government argues (Reply Br. 10, Sup. Br. 44) that the administrative and legislative authorizations, and the 14 year history of ratification by appropriation, are merely grants of discretionary authority to reward those from whom the Secretary of Interior wished to purchase the water rights, and that the Court of Claims jurisdiction must fall for want of words expressly stating that he *must* pay for all water rights taken. We should suppose that nothing short of unmistakable language would be enough to lead a Court to say that Congress intended to give the Secretary a discriminatory power to make payment to some and to refuse payment to others similarly situated. Certainly the Congress, so far as we know, has never granted so extraordinary a power to an administrative official. Surely, if the Congress intended payment to some it must have intended payment to all. And if the Congress intended payment to all, the Congressional "direction" which the Government feels necessary has been found. We note, too, that whatever discretion the Congress might be argued to have conferred is that of the Secretary of the Interior and not that of the Attorney General. The Secretary has determined that compensation should be made for these water rights—as for all other vested water rights taken by the Central Valley Project; the respondents are in court only because, having determined to pay for the water rights, he paid the wrong person or could not agree with the owner as to the price.

Finally, even if one were to indulge the Government in its belief (Sup. Br. 9) that plain Congressional intent cannot take the place of mandatory words such as "authorized and directed," the specific direction has been on

the statute books ever since 1902. Section 8 of the Reclamation Act states that the Secretary "shall proceed in conformity" with state laws, and that nothing in that Act is intended "to in any way interfere with the laws of any State * * * relating to * * * water used in irrigation, or any vested right thereunder". We have shown that Section 8 recognizes these riparian rights, which are vested under state law, and that the Secretary is directed not to depart from state law or to interfere with those rights. The long history of authorization and appropriation for these rights has always, therefore, not only been a plain direction in itself but also has been built upon the plain and the verbal "direction" of Section 8 as well.

III

VALID IRRIGATION RIGHTS ON THE SAN JOAQUIN COULD NOT BE SEIZED WITHOUT COMPENSATION EVEN BY WORK OUTSIDE THE RECLAMATION LAWS

A. The Navigation Immunity Does not Reach to the Seizure of Irrigation Water.

2. *The Western Water Right.* We set out in our main brief (pp. 38-42) a long series of statutes which indicated that the Congress, when it has been legislating with specific reference to the western waters, has in a very large number of instances subordinated navigation interests to those of irrigation. We urged, accordingly, that the basis for the costless taking of navigable waters—that there can be no property right as against the paramount navigation interests of the United States—was inapplicable to irrigation rights in the seventeen Western States. There has been no comprehensive declaration by the Congress which proclaims this as a universal rule in every situation, but we adhere to the belief that Congress has so frequently acted in particular types of cases that there is no important gap in the over-all protection, and certainly no doubt as to the over-all policy of the Congress. The Government makes a series of limited attacks on the

flanks of this argument, but leaves the central Congressional policy unscathed.

(a) It is unnecessary to follow the Government (Reply Br. 3-4, 7-9, Sup. Br. 31-33, 40-41) into its detailed contentions as to the exact force of the Act of 1866, the Act of 1891 or the Federal Water Power Act.[11] It is unimportant in these cases whether they go as far as we say they do or, as the Government says, not quite so far; they show in either case a lively solicitude on the part of the Congress that the western irrigator should not have his life's work subjected to a costless seizure in the name of navigation work.

(b) The Government (Sup. Br. 33-34) correctly points out that Congressional action was necessary to authorize a major diversion from the Sacramento River, and that conditions were imposed to "prevent serious injury to the navigable stream." This is but another application of the *Rio Grande* rule, and is irrelevant to an irrigation diversion which does not affect navigable capacity (*supra*, pp. 2-3). The irrigation diversions from the San Joaquin, as we have already shown (p. 3), are not present in the case of these riparian owners, and the nice theoretical

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[11] We note, to avoid any thought of agreement by silence; (a) the Government, by showing (Reply Br. 3-4) that the 1866 Act protected the appropriator and left the riparian rights where they stood, does not destroy the showing of a purpose to protect the irrigator; the Government apparently does not urge that the Act is inapplicable to navigable waters (cf. our main brief, 39). (b) We are unable to see that the fact that the 1891 Act did not transfer power to approve an obstruction to navigable capacity from the Secretary of War to the Secretary of the Interior (Govt. Sup. Br. 32-33) has any bearing on its stated purpose in the limited field of rights-of-way to leave untouched state control of irrigation rights. (c) The Government somehow reads the opinion of this Court in *First Iowa Coop. v. Power Commission*, 328 U. S. 152, as showing that the clause is meaningless except as it limited the powers of licensees (Sup. Br. 41). But this Court, drawing explicit analogy to Section 8 of the Reclamation Act, said that Section 27 did not preserve state regulatory authority over power projects because its effect "in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water used in irrigation . . . ." 328 U. S. at 175-176.

question which they present—the compensability of rights based upon a non-injurious diversion which, added to hundreds of others, has in fact obstructed navigable capacity—will probably never be litigated. The Corps of Engineers has, however, for many years faced this problem. We are unable to see that its solution gives the Government any support (see Govt. Sup. Br. 38-40). On the Government's own showing, the district engineer in 1917 proposed to authorize all irrigation diversions for 28 years in the future and then to reexamine the situation, while the higher authorities in the Corps thought any action at all to be unnecessary. Some of the passages from the report which were omitted by the Government should be added to explain this apparent indifference to the San Joaquin navigation (H. Doc. No. 332, 65th Cong., 1st Sess.):

"The survey develops the following pertinent facts:

(a) The paramount interest in this valley is irrigation rather than navigation.

(b) There is insufficient water, even if economically used, to supply the area that may ultimately become available for irrigation, estimated at about 1,000,000 acres.

(c) There is insufficient low water flow for navigation above San Joaquin bridge [about 16 m. above Stockton]. (pp. 2-3).

"* * * The conclusions of the district officer are as follows: First, That navigation can not now, nor can it for many years in the future, if ever, be extended to a point on the San Joaquin River at or near Herndon by any method or for any period annually, to secure a benefit from such navigation even approximately commensurate with the cost of the improvement.

"* * * The cessation of navigation of the river above the Mendota Dam appears to be quite definitely fixed at 1870 or 1871. During these years important events in the development of the San Joaquin valley occurred. In 1870 and 1871 railway transportation was extended

from Stockton to Mendota and Friant, respectively. Since 1871 water has been continuously diverted for irrigation from the San Joaquin River (p. 25).

(c) The Government (Sup. Br. 42) confuses the occasional enactment that the United States then has and never will have any commerce clause interest in a given stream with the quite different and more limited purpose of recognizing vested irrigation rights based upon navigable waters. We do not suggest, for one example, that the Federal Power Commission has lost or should surrender its licensing and regulatory powers on the San Joaquin (cf. Govt. Sup. Br. 40). We do say that Congress has ensured that nothing in that or any other regulatory scheme should destroy irrigation rights vested under state law.

(d) The Government (Sup. Br. 51-52) taxes its opponents with their failure to cite *Continental Land Co. v. United States*, 88 F. 2d 104, 109 (C. C. A. 9), cert. den. 302 U. S. 715, and *Washington Water Power Co. v. United States*, 135 F. 2d 541 (C. C. A. 9), cert. den. 320 U. S. 747. These cases deal with water power rights—the right to the flow of the stream—not with the irrigation, domestic, industrial, municipal and stock uses commonly described as "beneficial". Not one of the federal statutes upon which we rely has undertaken to protect power uses of navigable waters, and they remain in the west as in the east wholly subordinate to the navigation powers of the United States. The Government's suggestion of policy that power uses, because non-consumptive, should be superior to beneficial uses is not likely to be endorsed either by the Congress or by those responsible for the water and power policies of the Executive Branch of the Government.

(e) We quoted in our main brief (p. 41) Section 1(b) of the Flood Control Act of December 22, 1944 (58 Stat. 887) which provides:

> "The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

We noted that it had been incorporated, in terms or by reference, in every subsequent flood control or rivers and harbors act. The Omnibus Rivers and Harbors and Flood Control Act of 1949 (H. R. 5472, 81st Cong.) now pending action by the Senate contains the same provision. The Commission on Organization of the Executive Branch of the Government, in its exceedingly able Task Force Report on Natural Resources, Appendix L, states (p. 87) that this enactment is in recognition of the principle that:

> The consumptive use of water resources of the West is governed by water rights established under State law and by interstate and international compacts. It is essential therefore, that action by Federal agencies comply with local, State and interstate rights and interests, and that State agencies participate in Federal development projects as far as their resources will permit.

CONCLUSION

For the reasons set out in our main brief, as supplemented herein, we respectfully submit that the judgments of the court below should be affirmed.

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October, 1949

APPENDIX

Excerpts From Hearings Before Subcommittee on Interior Department, House Appropriations Committee

F. Y. 1938

A California delegation appeared before the Subcommittee; it included Representatives Lea, Buck, Englebright, Havenner, Welch, Carter, Tolan, McGrath, Gearhart, McGroarty, Voorhis, Kramer, Ford, Costello, Golden, Scott, Sheppard, and Izac.

REPRESENTATIVE LEA: • • • We have with us Mr. Edward Hyatt, who is State engineer of California, and for many years he has studied and been familiar with this project. He perhaps more than anyone else here, so far as Californians are concerned, is prepared to explain the project or answer any questions that the members of the Committee may care to ask him in reference to the subject. (p. 1588)

MR. HYATT: "The Project involves the purchasing of water rights on second class land, pasture land, so that its immediate effect will be to retire 250,000 acres of submarginal land." (P. 1588)

REPRESENTATIVE BUCK: "• • • Now, it has taken a long time, seemingly, to go out and negotiate with the owners of the water rights along the river, because this water in California is subject to two laws: Appropriation, which is the general law of the West, and riparian rights, which are also recognized in California. Both of these have to be taken into consideration, and in many cases, both kinds of owners have to be compensated in order to secure the Friant Dam and other reservoirs that may be built.

I am advised that these negotiations are practically at an end. I am advised that, if the money is forthcoming in the next fiscal year, the Bureau of Reclamation will be able to proceed and start the construction of the Friant Dam, building the Contra Costa Canal, and do some pre-

liminary work in connection with the removal of the railroad and secure the right of way at Kennett Dam." (P. 1605)

REPRESENTATIVE ENGLEBRIGHT: • • • There have been many legal questions to be taken care of such as water rights, and so forth. (p. 1611)

F. Y. 1940 (italics added)

MR. JOHNSON: What is the status of the Friant Dam now?

MR. PAGE [Commissioner of Reclamation]: It has not yet been started.

MR. RICH: What was the difficulty?

MR. PAGE: *The difficulty was that the water which is expected to be impounded at Friant Dam has been acquired by prior rights down the river. It was necessary to buy out some of the rights and to arrange for substitution of Sacramento River water and to satisfy others in the situation.* This is a very complicated problem in California, where water rights have been the subject of litigation for 75 years (p. 426).

• • • •

MR. CARTER: This Friant Dam has been delayed for some considerable time, has it not?

MR. PAGE: Yes. It has been delayed because of the water right negotiations for a matter of some 4 years. (p. 428)

• • • •

MR. FITZPATRICK: You say they are looking for the water, at the same time they do not like to give you the water rights without compensation?

MR. PAGE: *Well, the water rights belong to others than the beneficiaries of the San Joaquin Valley project,* and the reason for the prolonged negotiations is primarily because the interests which control these water rights are so large, and so influential, that if litigation had been

started, it was feared that it would have tied up that end of the project indefinitely, but it was felt necessary to work out these problems in advance of construction.

MR. FITZPATRICK: And they serve that section and five in the Valley, is that not true?

MR. PAGE: They are not direct beneficiaries of the Central Valley Project. *They have rights of their own which we must recognize and which we must compensate them for.* (p. 429)

* * * * * *

MR. FITZPATRICK: On the other hand, if they took them into court, it might tie that project up for many, many years?

MR. PAGE: Yes. We had two alternatives in this regard, one of which was to go ahead regardless of those rights, and the other was to try to negotiate them.

MR. FITZPATRICK: And they might get out an injunction against you.

MR. PAGE: Yes; that was threatened and we were fearful to go ahead of it because of that. (p. 430)

F. Y. 1941

REPRESENTATIVE BUCK: * * * Now that water-right difficulties have been adjusted and work begun on major units * * * much more rapid progress can be made on construction. (p. 1066)

F. Y. 1947

REPRESENTATIVE J. LEROY JOHNSON: Under California law the water that the Friant Dam stores and the Friant-Kern Canal diverts, or some of it, rightfully and legally belongs to water users downstream from the Friant Dam along the San Joaquin River. They have a moral, and under the California law they have a legal, right to that water, just exactly the same as a man has a legal and vested right in his land. (p. 556)

REPRESENTATIVE GEARHART: * * * Every drop of water of the normal flow of San Joaquin River is in ownership. (p. 580)

F. Y. 1948

REPRESENTATIVE J. LEROY JOHNSON: * * * To replenish the water we have taken out there, which is the property right of irrigationists along the San Joaquin River and in the valley there, for use around Bakersfield, by taking water from the Sacramento River and putting it, down at Mendota, into the San Joaquin River. (p. 1329)

F. Y. 1949

MR. JENSEN: * * * The next item is "Water rights, $332,000." Tell us about it.

MR. BOKE [Regional Director]: * * * on the San Joaquin River where the general story is that through our operation, under our set-up, we are depriving or we are alleged to be depriving in some cases, water users in that area of their water. * * * Part of that $332,000 would be used to settle the remaining outstanding claims that we have along the San Joaquin River, in an area known as the Friant to Gravelly Ford area. There are about, I believe, 226 users in that area and we have settled with about 212 of them.

We have certain payments to make for those water users whose use of the water we have damaged, or are damaging through the operation of the Friant Reservoir and the diversion of the San Joaquin River water down the Friant-Kern canal and out through the Madera canal. Some of the money will be used in settling those cases.

In addition, we have some 37 suits against us, I believe as a total, in the San Joaquin Valley. (pp. 1280-1281)

F. Y. 1950

REPRESENTATIVE THOMAS W. WERDEL: States that 1,000,000 acre feet of water used on grass lands had

been purchased from Miller & Lux for about $1,000,000. (pt. 2, p. 588)

REPRESENTATIVE LEROY JOHNSON: "• • • all of you know, that water in California is property. The water which we take out of the San Joaquin River must be replaced. (pt. 2, p. 593)